Supreme Court, U.S.
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No. 02 - 1718

In the Supreme Court of the United States

OLIVER "BUCK" REVELL,

Petitioner,

v.

DAVID HOFFMAN, ESTATE OF ALEXANDER B. MAGNUS AND AMERICANS FOR RESPONSIBLE MEDIA, a corporation.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULES

Sup. Ct. R. 10 c

INTRODUCTION

The decision of the Tenth Circuit should not be allowed to stand because it incorrectly suggests that public officials, a whole class of citizens, may be deprived of their fundamental right to seek a remedy against the most outrageous false and defamatory statements by a practical inability to prove "actual malice" and "recklessness." It is imperative that this Honorable Court clarify and enforce the application of ***Gertz v. Robert Welch***, 418 U.S. 223, "that there is no constitutional value in false statements of fact"; ***Harte-Hanks v. Connaughton, 491 U.S. 657*** and ***Milkovich v. Lorraine Journal***, 491 U.S.1, and ***St. Amant v. Thompson***, 390 U.S. at 731, which mandate the test of the improbability of the allegations, and require that as a minimum there must be an express or implied verifiably false factual allegation about the appellant, and that courts must examine all surrounding circumstances and the record in full. All the premises of ***New York Times v. Sullivan***, 736 U.S. 259, and its multiple progeny, cited more fully in the Petition, speak of circumstantial evidence as a means of sustaining the burden of proving by "concrete evidence" the subjective state of mind of a defamer that had "in fact entertained serious doubt as to the truth of the allegation on which a reasonable juror could return a verdict in his favor." ***Liberty Lobby, Inc. v. Dow Jones***, 838 F. 2d 1287. Short of circumstantial evidence, such proof can become a virtually insuperable burden for the Petitioner.

Respondent's Brief in Opposition to the Petition for the Writ of Certiorari brazenly distorts the record and misstates the issues, the law and the facts of this case. The defamatory statements on which this lawsuit is based were published by the Respondents in the book "The Oklahoma City Bombing and the Politics of Terror" and on the Internet. They are clearly referenced in the Petition to the record. In addition to citing the defamatory statements, Petitioner cited a number of surrounding circumstances and deposition statements illustrative of

Respondent's state of mind necessary to establish actual malice and reckless disregard for the truth by circumstantial evidence. This is amply elaborated in the Petition.

By jumbling together the statements cited for different purposes and perverting the record, Respondents have fabricated what appears to be a litany of alleged misstatements and distortions in The Petition for a Writ of Certiorari, intended solely to grossly mislead this Honorable Court and to prejudice it against the Petitioner by creating a totally false scenario at variance with the record and the facts. The deliberate distortion of the record is so outrageous that Petitioner respectfully submits, it calls for sanctions by this Court. The specific misstatements are refuted infra.

If nothing else, Respondents Brief In Opposition to the Petition for Writ Of Certiorari, demonstrates why the Petition should be granted. It helps to illustrate how confusion can be created surrounding the proper standard of review. Because of the apparent confusion in the interpretation of holdings of this Court and several Circuits about the applicable standards of determining "actual malice" and "recklessness" in the defamation of public officials, as it appears in the holding of the Tenth Circuit, Petitioner respectfully requests that this Court directly address the application of the Constitutional protections afforded public officials in seeking a remedy for false and reckless defamation by providing unequivocal guidelines how "actual malice" and "recklessness" must be determined by the totality of circumstances and reaffirm that lies and falsehoods are not protected statements and neither are re-publications of false and defamatory statements.

The principal issue in this Petition for Writ Of Certiorari, is a standard of interpretation of actual malice as determined by all the surrounding circumstances and the record in full evidencing the Respondent's state of mind. A decision by this Court establishing binding firm guidelines would help protect hundreds, if not thousands, of innocent public officials

maligned by irresponsible allegations, and would bring a standard of uniformity to all the Circuits.

REASONS FOR GRANTING THE WRIT

THE RIGHT OF PUBLIC OFFICIALS TO DEFEND THEIR GOOD NAME AND REPUTATION AGAINST RECKLESS AND FALSE ALLEGATIONS AND THE MANNER OF SO DOING ARE IMPORTANT QUESTIONS OF FEDERAL LAW.

Petitioner respectfully prays that this Honorable Court fully articulate the constitutional standards which protect the right of all citizens, including public officials, to protect their good name and reputation in defamation cases without in any way curtailing the free-speech protection of the First Amendment. The denial to certain citizens of the right to protect their good name and reputation, merely because they are public servants, while allowing others similarly situated citizens to exercise that right, represents an important question of federal law that has not been, but should be, clearly elucidated and settled by this Court. (Sup. Ct. R. 10 c.)

This Court has ruled on a number of related issues, but never directly addressed the issues presented in this Petition. Specifically, Petitioners pray that this Court reject the notion of creating a virtually impossible objective burden of proving by "concrete evidence" the subjective state of mind of the defamer. To the extent that criteria for determining actual malice and recklessness have already been promulgated in prior decisions of this Court, as set forth more fully in the Petition, lower courts should not deviate from these standards. Petitioner also asks that this Honorable Court determine that in this case the Tenth Circuit has not adhered to the teachings of this Court. Its decision disregards circumstantial evidence, the improbability of the allegations, requires objective evidence of a subjective

state of mind, and sanctions re-publication of defamatory materials. This decision is also at variance with other Circuits.

While this Court has admirably applied the First Amendment protections to the public in general, Petitioner respectfully submits that notwithstanding these holdings, which clearly state that the totality of circumstances and the full record must be considered, there remains a loophole in the law regarding public officials which permits an interpretation which requires a virtually impossible objective burden of proving by "concrete evidence" the subjective state of mind of the defamer. This allows reckless defamers to spread falsehoods under the guise of the First Amendment and to hide behind the impenetrability of their minds, and disguise defamation as protected speech.

Respondents reliance on the ***New York Times v. Sullivan***, 376 U.S. 254 (1964,) is misplaced. The import of the ***New York Times*** decision is to protect free speech and not the disseminations of lies and false allegations. Nor did this Court ever contemplate casting in concrete certain out of context excerpts, and stopping the clock on the more explicit interpretations of this decision by this Court, and its application to different situations, as attested by the series of subsequent decisions interpreting the ***New York Times***.

Respondent further claims that the Tenth Circuit never held that reliance on published materials creates immunity from libel. Yet, in Footnote 1, the Tenth Circuit expressly states that Hoffman relied upon several sources "accusing Revell of efforts to obstruct justice" and other statements. Does this mean that a defamatory statement on its face is rendered non-defamatory because it only re-publishes defamatory allegations? Respondent further argues that "Cases Regarding Deliberate Lies or Calculated Falsehoods Are Irrelevant." Is that what American justice stands for, especially in view of the fact that the entire record in these proceedings is replete with false and defamatory allegations and animus against law enforcement.

CORRECTION OF ERRORS AND MISSTATEMENTS IN RESPONDENTS BRIEF IN OPPOSITION

A. Alleged Misstatements of Law

In response to Respondent's allegations that "Petitioner totally failed to document any actual conflict between the Tenth Circuit decision at issue and this Court's prior opinions regarding proof of "malice" toward the public figure," Petitioner would respectfully refer the Court to the sections on Conflicts and Reasons for Granting the Writ in its Petition, which clearly address these issues.

B. Alleged Misstatements of Facts in the Record

The defamatory allegations on which this lawsuit is based are clearly identified as statements cited from the book "The Oklahoma City Bombing And The Politics Of Terror," and materials published by Respondent Hoffman on the Internet. Respondent's statement that the "libelous statements were simply never made, or were not made in print and were never published," is totally false. Each defamatory statement is accompanied by a citation in the Record. (See pages 2-5 of the Petition.) Most of these statements were also cited verbatim in the opinions of the courts below.

The examples of Petitioner's alleged misstatements, (page 3 of Brief in Opposition,) borders on the ridiculous. The allegations in the book that Mr. Revell knew in advance about the Pan Am 103 bombing and didn't stop it, but instead rushed to London's Heathrow Airport to remove his son and daughter-in-law from the doomed airplane clearly referred to Mr. Revell and no one else. To suggest otherwise, as Respondent's counsel does on page three of his Brief in Opposition ("Again, the comment does not directly refer to "Buck" Revell") is an insult to the intelligence of this Court.

The description of the alleged failure by Mr. Revell to prevent the bombing as "mass murder," made by Mr. Hoffman

at his deposition. It also clearly refers to Mr. Revell and is indicative of Respondent Hoffman's state of mind. So is the falsity of the allegation that Mr. Revell rushed to London, when in fact, the record shows unequivocally that at the time Mr. Revell was at FBI headquarters and all members of his family were in the U.S.

The allegations that Mr. Revell was transferred to Dallas to cover-up alleged CIA involvement in drug-smuggling, published by Respondent Hoffman on the Internet, specifically mentions Mr. Revell. (Rec. 140.) Published under a heading "Hoffman/Revell/E-Systems, Here is a national story of political/intelligence agency deception, intrigue and murder!" Yet, Respondent's attorney would have this Court believe that this letter does not accuse Mr. Revell personally of "deception intrigue and murder." The murder part alleges that a certain Michelle Cooper reported malfeasance "to Danny James - Revell's subordinate, - of the National Security Section of the FBI - who threatened to file charges on her (sic!) in retaliation. Cooper subsequently had her son killed, then she was killed."

Respondent's attorney would have this Court believe that Hoffman's repetition of the libelous statements, from whatever source, shields him from responsibility for the re-publication of these false allegations. Respondents counsel further submits that the actual statement in the Internet letter accusing Mr. Revell of a whole litany of crimes is merely "rhetorical" and therefore presumably not libelous. Moreover, after describing it as "rhetorical" on Page 4 of Brief in Opposition, the learned counsel for Respondents states on Page 7 that "This was never said." It may not have been said, but it was written and published on the Internet! (Rec. 140 ff.) Respondent Hoffman's admission in deposition that his defamatory statements were based on hearsay, feelings and ideas about mere possibility, are clearly documented and referenced in his deposition, and are reported merely to show recklessness and malice. They are not substantive allegations of -

defamation.

Allegations in the book link Mr. Revell, supposedly through some consultants, to formation of death squads to murder opponents of the Government, are also misrepresented in the Brief in Opposition. Mr. Wheaton, who was quoted as the source of this information, was dismissed from this case by Petitioner after providing an affidavit and stating in pleadings that his statements did not refer to Mr. Revell and that he did not even discuss the matter with Mr. Hoffman. The affidavit is cited in its entirety in the Petition. Respondent's counsel also falsely states on page 5 of the Brief in Opposition that "Wheaton acknowledges the death squad discussions." Mr. Wheaton's motion (Rec. 233) clearly states: "Mr. Wheaton met Mr. Hoffman only once and **did not tell him or provide him with information about the NRO operation."** This was the supposed solicitation to form murder squads.

Petitioner's counsel also falsely states on page 7 that the statement that "Mr. Revell was a damage control man for Oliver North's in the Iran-Contra situation was never published by Hoffman." In addition, Respondent makes the ridiculous claim that "It has never been published by anyone except "Buck" Revell." Hoffman's statement appears on page 318 of the book "The Oklahoma City Bombing And The Politics of Terror," and is cited in the opinion of the District Court. (Rec. 5,) and in the Tenth Circuit Opinion, page 4 and footnote 1.)

ALLEGED INACCURATE DESCRIPTIONS OF LIBELOUS STATEMENTS

The Questions Presented and Statement of the Case in the Petition accurately summarize the libelous allegations which are dealt with specificity and are quoted verbatim both in the decision of the district court and the 10th Circuit.

The alleged failure to act by Mr. Revell to prevent the

bombing of Pan Am Flight 103 resulting in the deaths of 270 innocent victims clearly constitutes mass murder by the perpetrators and would render Mr. Revell, as a high-ranking FBI official, liable if the had knowingly and deliberately failed to prevent this mass murder as Respondents allege.

CONCLUSION

This Honorable Court should grant this Petition and directly address the application of circumstantial evidence in all its aspects, and consideration of the full record, to recklessly propagated lies and falsehoods under the guise of the First Amendment. Public servants, such as the Petitioner herein, should not be second-class citizens when it comes to their ability to defend their good name and reputation against reckless dissemination of false and defamatory allegations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on June 23, 2003, three true and correct copies of the Petitioner's Reply Brief were mailed proper postage prepaid to:

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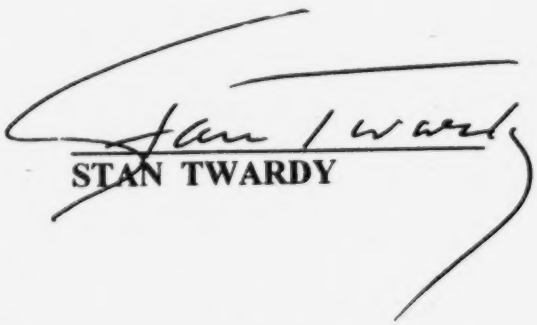

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